71-320

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMPEX CORPORATION and DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and THE COMMUNICATIONS COMMITTEE Party in Interest	Case No. 13-CA-7526

DECISION AND ORDER

On July 20, 1967, Trial Examiner Phil W. Saunders issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

[1] The Respondent's request for oral argument is denied as the record, including the exceptions and brief, adequately presents the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings[2], and recommendations of the Trial Examiner, as modified herein.

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[2] In the absence of exceptions thereto, we adopt *pro forma* the Trial Examiner's dismissal of the Section 8(a)(3) allegations concerning the discharges of Bailey, Liggens, Reid, and Taylor.

We note that the record contains undisputed evidence, not discussed by the Trial Examiner, of a speech and a letter, addressed to the employees by high management officials, reflecting Respondent's opposition to the union organization of its employees as well as, in the case of the letter, its view that the Committee, by providing employees with an effective means of obtaining redress of grievances about working conditions and similar matters, in effect served the purpose of a labor organization and thus eliminated the need for an outside union. In our opinion, this evidence provides further support for the Trial Examiner's 8(a)(2) and 8(a)(3) findings, which we herein affirm, with one modification. Our finding of an 8(a)(2) violation is limited to the Respondent's unlawful domination, support of, and interference with the *administration* of the Committee, and does not extend also to Respondent's conduct in regard to its *formation*, since the latter took place in February 1966, more than 6 months prior to the filing of the related unfair labor practice charge, and is therefore time-barred under Section 10(b).

We hereby correct the following inadvertent errors in the Trial Examiner's Decision: (a) The Trial Examiner characterized Riccardo, an admitted supervisor, as assistant industrial relations manager; the record, however, does not disclose what position Riccardo held with Respondent; (b) the record reveals that Earnest testified that at the machine shop meeting, Fulrath asked Magnussen and not Riccardo, as the Trial Examiner found, about the work performance records of Earnest and Ebel; (c) the record shows that Betten's mid-June conversation with

Conclusions of Law

We adopt the Trial Examiner's Conclusions of Law Nos. 1, 4, and 5, and we delete his Conclusions of Law Nos. 2 and 3, substituting therefor the following Conclusions of Law Nos. 2 and 3:

"2. By discharging Helen Earnest, Virginia Ebel, and Donald Betten, Respondent discriminated against employees in regard to their hire and tenure of employment in order to discourage membership in a labor organization, and, in the case of employees Earnest and Ebel, also to discourage participation in concerted activities for mutual aid or protection, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act."

"3. By dominating and interfering with the administration of the Committee and contributing support thereto, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Ampex Corporation, Elk Grove Village, Illinois division, its officers, agents, successors,

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[2] (Continued)
foreman Rubenstein concerned the higher wage rates at Respondent's California plant and not, as the Trial Examiner found, the Union as well. But we note that Rubenstein must have known that Betten had obtained his information about the wage rates in California from the recently distributed union pamphlets.

and assigns, shall take the action set forth in the Trial Examiner's Recommended Order,[3] as modified herein:

1. Delete from paragraph 1(b) of the Recommended Order the words "formation or."

2. Delete from the second substantive paragraph of the Appendix (NOTICE TO ALL EMPLOYEES) the words "formation or."

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[3] During the first 2 days of the hearing, in mid-January 1967, Respondent repeatedly offered to settle that part of the case involving the allegedly unlawful discharges of Earnest, Ebel, and Betten; and indicated its willingness to reinstate the employees in question, with full backpay, as part of such a settlement agreement. The General Counsel refused to entertain any settlement agreement which did not include all seven alleged 8(a)(3) dischargees. On February 9, when the hearing resumed after a 3-week lapse, Respondent offered to prove that it had sent unconditional offers of reinstatement to Earnest, Ebel, and Betten on January 25, 1967, requesting them to report for work on January 30. The Trial Examiner rejected the offer of proof, and the record does not otherwise reveal the employees' response, if any, to the reinstatement offers or whether, if the offers were accepted, Respondent in fact implemented its promise of unconditional reinstatement. In view of the incomplete state of the record on this aspect of the case, we are adopting the Trial Examiner's Recommended Order that the named employees be offered reinstatement by Respondent, with backpay to run from the dates of their discharges to such time as proper offers of reinstatement have been made. If, at the compliance stage of this proceeding, it should be determined, that, on January 25, Respondent did offer unconditional reinstatement to the named employees, and that the employees declined the offers, we would modify our Order herein by having backpay run from the date of the discharges until January 30, 1967, and from a date 5 days after the date of the Board's Order to the date on which Respondent unconditionally offers the named employees reinstatement. Cf. *National Screen Products,* 147 NLRB 746.

Dated, Washington, D. C. Dec 7 1967

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

TXD—389—67
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

* * (Caption — Case 13-CA-7526) * *

Charles Orlove, Esq., for the General Counsel,
Kenneth W. Black, appearing for the Charging Party.
Gerald S. Patterson, Esq., and Harry M. Sangerman, Esq., of McDermott, Will, and Emery, for the Respondent.

TRIAL EXAMINER'S DECISION

Statement of the Case

PHIL SAUNDERS, Trial Examiner: The unfair labor practice charges on which the complaint of November 17, 1966, is based—were filed by District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Union, on July 15, August 4, 11, 17, and 25, and September 16, 1966, against Ampex Corporation, hereinafter referred to as Ampex Company, or the Respondent. The issues litigated

were whether or not the Company violated Section 8(a) (1), (2), and (3) of the National Labor Relations Act, as amended. The Company denied the unfair labor practice allegations. A hearing was held before me and all parties were represented, and were given full opportunity to examine and cross-examine witnesses, to introduce evidence, and to argue orally. The General Counsel and the Company filed briefs.[1]

Upon the entire record and from my observation and demeanor of the witnesses, I make the following:

Findings and Conclusions

I. The Business of the Respondent

Respondent is and has been at all times material herein a corporation duly organized under, and existing by virtue of, the laws of the State of California. At all times material herein, the Respondent has maintained its principal offices at Redwood City, California, and maintains and operates places of business in various other States of the

[1] Respondent offered documents into evidence concerning its attempt to obtain prehearing discovery. In essence, Respondent first issued notices of depositions, and then requested the issuance of subpenas for the purpose of directing witnesses to appear at the Board's Regional Office on December 28, 1966, in accordance with a notice of depositions. Respondent's request for subpenas was denied by the Regional Director, and the National Labor Relations Board. The Respondent claims that it was denied due process because it was denied prehearing discovery. This claim is immediately rebutted by my granting of a continuance immediately after General Counsel rested his case in chief. Moreover, a party is not denied due process when it fails to receive that which it is not entitled to. Board and court decisions are clear that a Respondent in an unfair labor practice proceeding is not entitled to prehearing discovery. To hold otherwise would seriously hamper the Board's function of carrying out the policies of the Act.

United States, including, but not limited to, the States of Illinois and California, where it is engaged in the business of the manufacture of audio-video equipment. The Respondent's plant at 2200 Arthur Avenue, Elk Grove Village, Illinois, is the only place of business involved in this case. During the past year, in the course and conduct of its business operations, Respondent has manufactured, sold, and distributed products valued in excess of $100,000, which products were shipped in interstate commerce directly to States of the United States other than the State of their origin.

Respondent is now and at all times material herein has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, is, and at all times material herein, has been, a labor organization within the meaning of Section 2(5) of the Act. The Company denies that the Communications Committee, herein called The Committee, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. The Issues and Events

The complaint alleges that from on or about November 1965, the Respondent did initiate, form, sponsor, and promote The Committee, and at all times since November 1965, continuing to the present, Respondent has assisted, dominated, contributed to the support of, and interfered with the administration of The Committee. It is further alleged that the Company discriminatorily discharged the following employees working at its Arthur Avenue plant on or about the dates set opposite their names:

Helen Earnest	July 12, 1966
Virginia Ebel	July 12, 1966
Donald Betten	July 15, 1966
Evelyn Bailey	August 19, 1966
Mildred Liggens	August 19, 1966
Birdie Reid	August 19, 1966
Alma Taylor	August 19, 1966

It appears that the Union started its organizational efforts at the Respondent's Arthur Avenue plant in early May 1966.[2] On May 9 the Union held a meeting with seven or eight employees at the home of Evelyn Pulliam, and at this time authorization cards were distributed to each employee in attendance at the meeting with the request that they attempt to get other employees to sign them. On June 17 the Union also distributed handbills at the plant.

B. The Testimony

As to Earnest-Ebel-Betten:

Alleged discriminatee, Helen Earnest, started working for the Company on March 1 as a class B mill and lathe operator. Earnest testified that she attended the organizational meeting in early May and that from May until her discharge on July 12, passed out around the plant about 50 to 60 authorization cards to other employees. Earnest stated that in the latter part of June, She and alleged discriminatee, Virginia Ebel, talked to their foreman, Charles Magnussen, and asked him if they could be classified as class A operators. Earnest testified that Magnussen agreed with them that they were doing class A work, and that he would make a request for such a reclassification. Earnest stated that around July 4, Magnussen then informed them that Respondent's assistant industrial relations manager, Riccardo, had denied the request on the grounds that the department did not have any class A work, but if they did receive such they would

[2] All dates are 1966 unless specifically stated otherwise.

be reclassified. Earnest and Ebel then immediately talked to Supervisor Riccardo and were again told that the department did not have any such work. About a week later a meeting was arranged by Evelyn Pulliam with Riccardo, and with Respondent's Industrial Relations Manager Thomas Fulrath. Earnest testified that this meeting lasted 2 days with Fulrath first inquiring of each employee (about 14 of them in this department) as to their difficulties and problems. At this meeting Earnest and Ebel asked why they could not be classified as class A operators, and were again told that there was no such work available. Fulrath then informed Earnest and Ebel that he would have a consultant come in to study the matter and to ascertain whether or not they were doing class A work. Earnest stated that Fulrath also asked Riccardo if they were good workers and if they—Earnest and Ebel—were presently doing class A work, and that Riccardo replied in the affirmative.

Earnest testified that on July 12, she and Ebel were called into the office, and Fulrath then asked them, "Well, how do you girls feel today?" Earnest replied that they still had not been reclassified, and then Fulrath stated, "You girls are not happy with anything. We have tried to do everything to please you. If we can't do anything to please you, we want you out of here, and we want you out of here now." Earnest testified that Fulrath did not even want them to go back into the machine shop department to get their personal belongings, and that Fulrath had a guard follow them like they were "some kind of criminals."

Earnest stated that she only performed a particular kind of work in the machine shop, and that she did not operate the grinder or the Pratt and Whitney machine and that employee James Terry ran this machine. Earnest testified that employees Doris Holmes and a "fellow named Bob" had class A ratings in the machine shop while she was working there, and that Holmes did not perform any work that she herself did not do.

Virginia Ebel started working at the Respondent's plant here in question on April 14 and was also employed in the machine shop with a class B classification. Ebel testified that starting in June, and for 5 to 7 weeks thereafter, she passed out about 50 authorization cards for the Union. In most other respects the testimony given by Ebel substantiates and corroborates that given by Earnest, as aforestated.

The General Counsel also produced testimony through Evelyn Pulliam to the effect that employees Robert Boland and James Terry were class A operators in the machine shop department, and that they did the same work as Earnest and Ebel. However, Pulliam then stated that Holmes operated a tracer mill and that Terry ran the Pratt and Whitney machine. Pulliam testified that in the early July meeting of machine shop employees with Fulrath and Riccardo, as aforestated, Fulrath initially stated that he wanted to get to the bottom "of what all the dissension was in the machine shop," that Earnest and Ebel told Fulrath that they were performing the same type of work as the rest of the employees, and that Foreman Magnussen stated that Earnest and Ebel were qualified to be class A operators. Pulliam further related that on the day Earnest and Ebel were terminated—Supervisor Riccardo told Pulliam, "he felt that things would go smooth now in the machine shop, that he had gotten rid of the troublemakers."

Alleged discriminatee, Donald Betten, started working for the Company as an inspector in January 1966 and was discharged on July 15. Betten testified that he received union authorization cards from Evelyn Pulliam, and that he passed out eight or nine of them about 10 days prior to his termination. Betten also stated that during the middle of June he had a talk with his foreman, Harold Rubenstein, about the Union and wages at the Company's plant in California, that there were several employees present, and the conversation arose when the union pamphlets had been passed out. On July 15, Betten started to set up a job when Foreman Rubenstein told

him that it was the wrong way to do it, and as a consequence an argument resulted between the two of them. At quitting time Rubenstein informed Betten that he was going to let him go. Betten then talked to Fulrath, and according to Betten he was then told, "Shut up. You are a troublemaker."[3] Betten testified that Fulrath never gave him any reason for his discharge.

As to activity on behalf of the Union—Evelyn Pulliam stated that Ebel, Earnest, and Betten had passed out authorization cards, and that the day Betten was discharged she and Betten were engaged in a conversation about the Union when she observed Foreman Rubenstein sitting at his desk watching them.

The General Counsel produced testimony through Doris Holmes to the effect that Earnest and Ebel ran the lathes, mills, and drill presses, but that they did not work on the Pratt-Whitney machine nor did they operate the tracer machine.

As to Bailey, Liggens, Reid, and Taylor:

The above alleged discriminatees all worked in department 775 at the Respondent's plant, and their foreman was Henry Neuman.

Bailey started working the latter part of June doing wiring and soldering and was discharged on August 19. Bailey testified that she signed several cards for the Union, and on August 12 passed out authorization cards to an employee by the name of Roman. Bailey stated that after the lunch break on August 12, Roman gave the union cards back to her unsigned, and at this time she and employees Roman and Jeano, along with Liggens, Reid, and Taylor, engaged in a conversation in which the above four alleged discriminatees attempted to inform Roman and Jeano of the advantages for the Union. Bailey

[3] At this talk with Fulrath—Betten was with Kenneth Seyller and Dorothea Jergens who had also indicated that they were quitting because of Betten's termination.

related that later the same day she heard employee Jeano tell Foreman Neuman that Bailey was the one who had given union cards to Roman, and that Neuman was also explaining to Roman and Jeano his thinking as to why the employees did not need a union. Bailey testified that on August 19—Neuman sent for her and Reid and then informed them of their terminations on the grounds their work was not satisfactory, and that they were 60-day probationary employees.

Reid started working for the Company on July 5 and also did wiring and soldering. Reid corroborated the testimony of Bailey as to their conversations about the Union with Roman and Jeano, as aforestated. Reid testified that prior to her discharge on August 19—Foreman Neuman had never discussed her work, but that on her termination Neuman told her that he work was poor and that she was getting to many rejects. Reid further related that she signed two cards for the Union, and that she discussed her card signing with Bailey, Liggens, and Taylor.

Alma Taylor started working at the plant on June 21, and was also discharged on August 19. She too did wiring and soldering in department 775, and signed a card for the Union on August 18. Taylor's testimony also substantiated the conversation about the Union between Bailey, Roman, and Jeano.[4]

Foreman Neuman testified that each day he constantly observed the work of Liggens, Taylor, Bailey, and Reid. Neuman stated that Liggens' work was poor—that she would wire cables wrong, burn up wires, that her work was a "constant mess," and that Liggens was terminated because of her poor work and that she was a probationary employee. Neuman also testified that his repair girl, Martha Strobel, and an analyzer, Gordon Scherer, constantly complained to him about how many errors Liggens was making, and he would then tell Liggens that she would have to improve her work.

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[4] Alleged discriminatee Liggens did not testify.

Neuman stated that the original work on filter boxes was done by these four alleged discriminatees, and that after they completed their work on them the filter boxes went to the inspection department. Neuman related that he then started getting numerous rejections, and the matter became serious enough so that he asked each of the four alleged discriminatees to put tags with their initials on their work, and starting in August records were made on the performance of their work (Respondent's Exhibit 14). Neuman testified that almost every day he had talks with Bailey, Reid, and Taylor and told them to watch their work because of the rejects and complaints he was receiving from his repair girl and the inspection department. Neuman stated he did not issue any written reprimands as all four of alleged discriminatees here involved were probationary employees. He further testified that on August 19, he terminated all four of them because of the poor work they were doing, but that he first discussed his decision with his boss, Carl Claris, because at the time there was a serious labor shortage and the plant was understaffed. Neuman testified that he never talked to these four alleged discriminatees about the Union and never heard them talk about the Union, but that he thought employees Martha Strobel and Jacques Ascar had signed cards.

Penny Spokes testified that while she worked in department 775 she was required to repair the preliminary work done on the filter boxes by the four employees here in question. Spokes stated that the work was identified by the yellow tags which were attached to each piece of work, and that considerable repairs were necessary because it was "carelessly" done. Spokes stated: "[M]ost of the time the sodder was lumpy and dull, which meant it was cold, and we would melt it down, like I said before, and a lot of times the wires weren't there, or the capacitors or the resistors would be in the wrong places. And a lot of times the bare wires would touch. We would have to fix that, and also the capacitors would be crushed. The plastic or the coating on the outside would be crushed,

and we would have to replace those." Spokes further testified that in conversations with Neuman he told her that Taylor was doing bad work and that several cartons of filter boxes had been rejected due to poor workmanship.

As to the Communications Committee:

Fulrath testified that The Committee started in September 1964, at the Respondent's Audio plant on Landmeier Road (such plant is not involved in this proceeding), and that The Committee started at the Arthur Avenue plant in February or March 1966.[5] The purpose behind the Communications Committee was expressed by Fulrath as follows:

> Well, we are a profit-sharing company, Ampex has had a profit-sharing program for a number of years. And we thought that the Communications Committee would provide a means for people to exchange and make suggestions about how to improve efficiency in ways that would affect all and improve our profit-sharing. It included, of course, the betterment of employee relations. This is related to the improvement of efficiency. And also the committee was designed to be a safety committee. Our insurance carrier requires that we have an employee safety committee, and the insurance carrier recognizes this committee as a safety committee.

Fulrath testified that the initiative in the formation of The Committee came from management; he was the first chairman; The Committee does not have a constitution or bylaws; meetings are held on a monthly basis with minutes being kept; Fulrath picks the dates of the meetings; the employees who attend are picked at random

[5] Fulrath explained that the Arthur Avenue plant was opened in November 1965 and immediately a Communications Committee was formed and met with the Landmeier Road plant committee until February or March 1966, after which time the Arthur Avenue Committee met at its own plant.

off the employees' roster; Fulrath attends all meetings along with senior engineers and supervisors (the plant manager) in particular; and if the chosen employee is absent then the supervisor of the department picks some other employee out of his department. Fulrath also stated that employees are paid for the time spent at the meetings; the Company bears the cost of clerical help; the employees' representatives are paid the time spent in attendance at Committee meetings; meetings are held in the plant conference room; and there are no officers for The Committee. Fulrath explained the general procedures which are followed at The Committee meetings. He stated that he conducts the meetings as chairman, he takes the notes for the minutes which he dictates later to a secretary, and that the selected employees at the meetings are asked to present suggestions of other employees who work with them. Fulrath went on to explain that when The Committee was first established there was no union activity, and that the possibility of such never entered into the Respondent's decision in going forward with The Committee. He also testified that individual employees complaints or grievances are referred back to the departments, and that The Committee attempts to discuss matters of a broader interest.

Employees Ebel and Holmes also gave some testimony for the General Counsel relating to The Committee. Holmes testified as follows:

> He [Fulrath] said that this was the way that the company and the employees had of getting together and starting their problems and their needs and that. That's what the Communications meeting was for.

C. Final Conclusions

The Act defines a labor organization as:

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers

concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Respondent argues that The Committee lacks the structural characteristics requisite to the notion of an organization, that The Committee is synonomous with all personnel at the plant since every individual participates —and, therefore, the concept of an employee committee on one side and management representatives on the other side is absent. The Company further maintains that individual complaints or grievances are not discussed, but referred back to department supervisors and handled under the Respondent's grievance procedure, that The Committee does not deal with the Company concerning any conditions of employment, that there is no agenda at the meetings of The Committee and each participant is permitted to talk or to say nothing as he so desires, and that the Company has not recognized The Committee as a representative of its employees—it is merely a forum to express views.

This record makes it clear that the real purpose of The Committee is to present suggestions to the Company on behalf of all the employees upon subjects pertaining to conditions of work. Thus, Fulrath stated and conceded that The Committee would make suggestions to how to improve efficiency in ways that would effect everyone, and which included the "betterment of employee relations." Furthermore, the testimony and exhibits show that The Committee carried out the above purposes as members presented complaints and inquiries regarding the Company's wage policies as it related to machine operators, automatic increases that were not being paid on time, and night-shift rates. Complaints and inquiries were also made from time to time on transfers, seniority, on hours of work, timeclocks, lightening, meals, parking, supplies, chairs, floors, along with several other matters.[6] As

[6] A few random entries of the minutes by The Committee from February through December 1966, evidenced by General Counsel's Exhibit 5, shows the following:

pointed out these are but a few of the many instances where The Committee and the Company discussed matters traditionally raised at bargaining sessiois between labor and management. It is clear that the meetings of The Committee are not merely a forum for a mutual expression of views, but, to the contrary, The Committee does deal in complaints from individual employees. While it may be true that some complaints or inquiries were made spontaneously, still Fulrath apparently made no attempts to cut off discussions of these matters or to

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[6] (Continued)

Questions/or Suggestions	Answer
Shouldn't a machine operator get more money for set up and operation.	There is a certain, amount of set up provided in the present machine operation job description. However, the machine operators job will be reviewed by the Industrial Relations Department.
There are a number of pay shortages and some automatic increases are not coming through on time.	We are investigating the pay shortages. Any employees who have questions should contact the Industrial Relations Department immediately.
There are some girls on the night shift who went on days to get more training. They had the idea they would get 10 cents an hour more after they got this training.	Mr. Dye will check into this situation.
There are some people on the night shift who do testing but are paid assembler rates.	Mr. Dye and Mr. Fabel of the Industrial Relations Department will check into this. (We pay the rate of the job classification which the people have and the job classifications are based on duties of that person).

even caution the members that they were not proper subjects for consideration. Indeed, Fulrath accepted these complaints, and as a consequence, some of them were disposed of at the meetings while others were referred to appropriate officials, departments, or supervisors for determinations.

There is no doubt that the Company created the Communications Committee. It is also equally clear that the Company's initial action in so doing was not prompted by any desire to thwart organization of its employees in the Union for the reason that the Union was not engaging in any organizational activities at that time—nor was the Union so engaged in February or March 1966, when The Committee was instituted or started on its own at the Respondent's Arthur Avenue plant, as aforestated. Nor did The Committee perform the normal functions of a union in obtaining recognition as the exclusive bargaining representative of the employees, and there

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[6] (Continued)

TRANSFERS AND SENIORITY:	
Does seniority of a girl transferred from the audio products plant entitle her to bump out a girl who is already on the job at the time of the transfer	No. However the girl who transferred keeps her seniority. Layoffs and recalls will be made by seniority and seniority is also a factor in profit sharing and bidding.
Are girls promoted to utility operator on the basis of seniority.	Promotions are based on seniority and qualifications. A girl must have the knowledge and versatility to be a Utility Operator
Can the front door be open until 5:00 for the convenience of people leaving later?	Yes, the guard will lock the door after this time.
When the people work more than two hours overtime at night could they have a coffee break at 6:18?	Yes. Referred to Chuck Wheeler.

is no evidence that the representatives of the employees on The Committee ever engaged in bargaining negotiations with Fulrath. Nevertheless, I am convinced that The Committee meets the broad technical requirements of a labor organization since it was formed and maintained by the Company, at least in part, for the purpose of dealing with it concerning conditions of employment, and the Company thereby engaged in unfair labor practices within the meaning of Section 8(a)(2) of the Act.[7]

While it is sufficiently clear that the Respondent has contributed financial and other unlawful support and

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[7] The charge with respect to The Committee was filed in September so the cutoff date under Section 10(b) of the Act is March 1966. The Company argues that there were certain allegations in the complaint involving the operations of The Committee that occurred prior to March, and that, therefore, no unfair labor practice findings can be based upon them. The Company points to the allegations setting forth the initial forming and sponsoring of The Committee, determining its structure, the number and tenure of committeemen, the eligibility requirements for committeemen, and the method of selecting committeemen. The General Counsel introduced testimony relating to events which occurred prior to March only as background evidence. While the initial formation, sponsoring, and structure of The Committee took place in 1964, Fulrath admitted that The Committee started to meet on its own at the Arthur Avenue plant in February or March. Accepting the latter the allegations in the complaint pertaining to The Committee came within the 6-month period. If February be deemed controlling then background evidence can be used to explain any ambiguous or equivocal conduct. Subheadings (c) through (n) in paragraph VI of the complaint all transpired on an independent and continuing basis at the Arthur Avenue plant within the 6-month period, and the testimony as to the original formation and organization of The Committee elsewhere in 1964, as aforesaid, merely provides background to supply clarifications that the same procedures were followed when The Committee started to function on its own at the plant here in question.

assistance to The Committee, there remains for consideration here, the question of whether the Respondent has dominated and interfered with the formation or administration of The Committee. Section 8(a)(2) of the Act provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

There is no dispute that The Committee was formed by the Company. This record shows that the Respondent determines the method of selection of representatives, and even at times supervisors select particular representatives.

Respondent, through Fulrath, determines dates of meetings, and Respondent pays all financial support necessary to The Committee's continued existence. Employees are paid for all time they devote to Committee affairs, including the time they confer with each other on Committee business. The Board has consistently declared committees and plans of the type here involved as assisted, supported, interfered with and dominated by the employer with whom they deal.

The Company argues that Earnest and Ebel were discharged because of their dissatisfaction with the Respondent's willingness and attempts to reclassify them in class A work. The Company points out they explained to them that when enough class A work became available to warrant their reclassification, Earnest and Ebel would be reclassified upon their proving class A work ability. The General Counsel on the other hand, states that whether or not they were entitled to be class A operators, or entitled to do class A work is not material, but that the important point is that their discharges resulted from their concerted efforts to obtain a raise.

As aforestated earlier herein—both Earnest and Ebel worked as class B operators. Both openly distributed authorization cards for the Union prior to their terminations, and it appears that the Union's June 17 handbill

(General Counsel's Exhibit 3) motivated them to ask for reclassification. During the latter part of June they then asked Foreman Magnussen for a class A rating, and Magnussen told them he would so recommend. In early July they were then informed by Magnussen that Supervisor Riccardo had denied their requests.[8] The same day they talked to Riccardo, and he also them that there was no class A work available: Ebel and Earnest, along with Evelyn Pulliam, then requested a meeting, and, as pointed out earlier herein, such a meeting was held with all the machine shop employees present along with Fulrath, Riccardo, and Magnussen. Fulrath then asked each employee what their problems were, and when he came to Earnest and Ebel he treated their problem as an upgrading to class A operator's status. As pointed out the same go-around between Ebel, Earnest, and Riccardo was reenacted or restated. Fulrath then broke the argument by offering to have an outside consultant study their jobs, and to which Ebel and Earnest agreed. This record also shows that during this discussion Ebel raised the fact of higher wage rates at the Respondent's California plant, and when Fulrath asked how she knew Ebel answered she had one of the Union's handbills—General Counsel's Exhibit 3. During Fulrath's discussion with Ebel and Earnest, Magnussen's recommendation was again solicited, and he stated they were good workers or otherwise he would not have sought reclassification for them. At the time of their discharge on July 12, Earnest told Fulrath that she and Ebel were not unhappy with fellow employees nor with the Company, and that the only thing they wanted was a reclassification.

I find that the concerted union activity by Ernest and Ebel to obtain reclassifications was the immediate motivating factor in their terminations. The Company contends that it had no knowledge of any union activity of these two employees. However, there is well-established Board and court precedent that such knowledge maybe inferred from the record as a whole. *Wiese Plow Welding Co.*, 123

[8] Neither Magnussen nor Riccardo testified before me.

NLRB 616; *Radio Officers' Union of the Commercial Telegraphers Union, AFL* v. *N.L.R.B.*, 347 U.S. 17 (1954); and *Pyne Moulding Corporation*, 110 NLRB 1700. Moreover, both of these employees were active in and around the plant in the circulation of many union authorization cards, and at the meeting in July, Ebel specifically informed Fulrath that employees in the Respondent's California plant were receiving higher wages, and that she had obtained such knowledge from the Union's handbill. From that time on it can reasonably be assumed that the Company had at least inferrable knowledge of their union interests and activities. There was no specific denial by Fulrath of the above, and, therefore, it remains in this record as evidence that a supervisor of the Respondent was aware of their union interests prior to the discharges. This record also reveals that the Company had a small work force of about 14 employees in its machine shop, and that Earnest and Ebel were machine operators and the Union involved is the Machinists Union. Moreover, this record further shows that in a weekly production meeting of management people at the time the Union started to organize, supervisors were told that the employees "have started union activity." I have also attributed union knowledge to the Company on the basis of additional testimony by Foreman Neuman who admitted that at least five or six employees in his department had directly talked to him about the Union, and that when union handbills, folders, or pamphlets were distributed there was then "a general discussion" about the Union. There is no evidence in this record that such discussions were in any way limited to only Neuman's department, and the record as a whole shows the opposite.[9]

At the meeting in early July, Fulrath told the machine shop employees that he wanted to get to the "dissension" in the department. It is noted that the Company must have

[9] Both Earnest and Ebel acted in concert to obtain reclassification. Each knew that one was as qualified for a class A rating as the other, and the best way to obtain the rating was to act together. As both testified, neither ever sought reclassification without the other.

assumed that Earnest and Ebel were mainly responsible for the supposedly dissentious conditions in the machine shop because the entire shop was called into the meeting lasting 2 days on Earnest's and Ebel's request to meet only with Fulrath or Manager Narma. As pointed out, the Company thought that they had located the cause of the Union's organizing efforts when they received the complaints from these two employees, and this fact is further borne out on the day of their terminations when Earnest replied to Fulrath that they still had not been reclassified. Their efforts at reclassification had been started or stimulated as a result of union activity, and when their desire in this respect remained unsatisfied and at odds with Fulrath, they were discharged. There is no contention or argument that Fulrath found any fault whatsoever with the work they were doing or with their work habits in the actual performance of their jobs. Also, the unusual circumstances of using a guard as a private escort to see that they immediately left the plant further indicates something other than discharge for valid cause, and Supervisor Riccardo's undenied statement to employee Pulliam on the day of their discharge that the machine shop would now go "smooth" since the Company "had gotten rid of the troublemakers" puts at rest any doubt but that the terminations resulted from Earnest's and Ebel's concerted efforts to obtain wage increases through union backing and support.

Section 7 of the Act grants to employees the right ". . . to engage in other concerted activities for the purpose of collective bargaining. . . ." Collective bargaining is defined in Section 8(d) of the Act as pertaining to, among other things, wages. The Board has repeatedly found that discharges motivated because of a concerted effort for higher wages is violative of the Act, and the fact that these two employees acted concertedly is consistently revealed in this record as their "problem" at the July meeting was handled as a single matter, as aforestated, and they were further terminated as a pair with the only assigned reason to both of them that they were not happy and that the Company could not please them.

The Respondent argues that the General Counsel failed to show that the Company had knowledge of Donald Betten's activity for the Union, that there was no showing of union animus, and that the evidence clearly demonstrates that Foreman Rubenstein discharged Betten for his insubordination.

As described herein, Betten was discharged by Foreman Rubenstein soon after their argument concerning each other's competence. According to Betten's testimony the argument started after Rubenstein told Betten that he was doing a particular job incorrectly. Betten admittedly became irritated with words then exchanged between them, and the argument apparently reached it peak when Betten told Rubenstein that he was not qualified as a foreman.

From this record it appears clear to me that the Respondent had knowledge of Betten's activity for the Union. It is undenied that when Betten learned of Ebel's discharge on July 12, he did not hide his feelings about it when they met in the plant personnel office, and he then characterized her dismissal as "a dirty deal." Virginia Strand, a secretary in the personnel office, was only "a few feet away."

A month prior to his termination and at a time when union pamphlets were distributed, Betten and Foreman Rubenstein also had a discussion, as aforestated, on the wages being paid at the Respondent's California plant. There was a sufficient inference from this conversation to at least put Rubenstein on notice that Betten was engaging in union activity. This record also shows that Betten circulated union authorization cards before his discharge, and that he then asked Evelyn Pulliam what should be done with them. At this time Rubenstein was sitting at his desk approximately 10 to 15 feet away from them, and Pulliam testified that Rubenstein was watching them. Based upon the above, and for several other reasons previously detailed in the initial discussion on Earnest and Ebel—I find that the Company had knowledge of Betten's union activity prior to his discharge.

It was alleged in the complaint that Kenneth Seyller was a supervisor within the meaning of the Act, and the General Counsel introduced considerable testimony in efforts to prove the same in further substantiation that the Company had knowledge of Betten's union activity. In this respect the Respondent states as follows:

> The uncontradicted evidence shows that Seyller, as all of Respondent's leadmen, had no authority to hire, fire, transfer, discipline, suspend, layoff, recall, promote, reward or discipline employees, nor did he have authority effectively to recommend any of these actions. Furthermore, the uncontradicted evidence demonstrates that with respect to wages, benefits and conditions of employment leadmen such as Seyller are treated the same as all hourly-paid employees whereas all supervisory personnel are treated differently. This in itself suggests a non-supervisory status. As described in the statement of facts above, Seyller was nothing more than a conduit through which work orders moved from the top of a pile of orders in a production control box to an available inspector. When not handing out these work orders, he performed the same layout inspection work as that performed by his fellow inspectors. At best when pulling work orders from the top of the pile, Seyller was engaged in a routine assignment of work requiring no independent judgment. Seyller stated that he spent six hours per day assigning work, however he admitted on cross examination that a good portion of this time includes helping other inspectors and setting up machines.

To be a supervisor under the Act the individual involved must consistently display true independence of judgment in implementing this authority. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *Poultry Enterprises, Inc.* v. *N.L.R.B.*, 216 F.2d 798, 801-802 (C.A.

5). Nor will the existence of independent judgment alone suffice; for "the decisive question is whether [the individuals involved] have been found to possess authority to use their independent judgment with respect to the exercise by them of some one or more of the specific authorities listed in Section 2(11) of the Act." *N.L.R.B.* v. *Brown & Sharpe Manufacturing Company,* 169 F.2d 331, 334 (C.A. 1).

I find that on the record before me the job of leadman lacks the required combination of independent judgment in the performance of the supervisory powers listed in Section 2(11). No additional discussions or ramifications of this issue need be set forth as I have found sufficient evidence in other respects to substantiate the overall position of the General Counsel that the Company had prior knowledge of Betten's union activities, and, in the final analysis, the General Counsel does not even rely on Seyller's testimony. The position of the General Counsel in his brief is stated thus: "This issue appears moot in view of Seyller's testimony that he did not communicate to Rubenstein his direct observation of Betten's card distributing activities."

On the morning of Betten's discharge Foreman Rubenstein called Seyller aside and informed Seyller that he was going to let Betten go. That same afternoon fellow employee, Bessinger, came to Betten and asked him to set up a job claiming such instructions from Rubenstein. A short while later Rubenstein then appeared and told Betten he was not setting up the job properly, and an argument then ensued between them, as aforestated. At 4 p.m. Rubenstein informed Betten that he was going to let him go and that he did not believe Betten was "happy here." Betten replied that he was "happy," and also asked Rubenstein for the reason for his discharge. By this time Betten was joined by Seyller and Jergens in the plant personnel office in protest of his discharge, but the only thing Betten heard in the personnel office was that he should "shut up," and that he was a "troublemaker."

This record is devoid of any contention or testimony that Betten was a poor worker or that he took part in any misconduct except in respect to the one incident in question here. Betten asked the reason for his discharge on two specific occasions, and in reply was merely informed that he was "unhappy" and a "troublemaker."

On the basis of all the evidence I find that the Company, through Rubenstein, conducted a campaign of harassment on July 15 against Betten because of his adherence to the Union; that this was undertaken to provoke Betten into providing the Company with a reason to discharge him; and that this violative conduct was culminated after Betten was detected by Rubenstein as a union supporter. As pointed out, the events on July 15 reveal that in the *morning* Rubenstein told Seyller that he had to let Betten go—this was *before* the argument between Betten and Rubenstein on the setup job Betten was doing—then that afternoon Rubenstein started implementing his plan to get rid of Betten. While a surface view of the events on July 15 indicate conduct which may be characterized as insubordination, a closer look at the facts clearly shows that Betten's actions were precipitated by the Respondent's harassing tactics and provided, as planned, a convenient pretext for discharging a union supporter. Accordingly, I reject the Respondent's reliance on a naked right to discharge for alleged insubordination, as it was not the real reason for the discharge, and find that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Betten.

I am fully aware, in making my findings as to Betten, Ebel, and Earnest, that there is lacking in this case the usual independent 8(a)(1) allegations, and which, if found, would normally support a showing of union animus and thereby lend some additional weight or light to the discharges of these three employees. However, the violative conduct by the Company is adequately substantiated by a preponderance of the evidence without such independent

8(a)(1) findings, and upon the circumstances and reasons given herein the discriminatory discharges can and do stand on their own.[10]

I turn now to the allegations and testimony in relationship to alleged discriminatees Bailey, Liggens, Reid, and Taylor.

The General Counsel argues that Evelyn Bailey, in particular, attempted to influence other employees to support the Union, and that Bailey's attention was aroused when she heard her name mentioned in a conversation between Roman, Jeano, and Neuman, as aforestated. The General Counsel further maintains that Neuman knew all there was

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[10] Throughout the hearing in this case the Company made several offers on the record to reinstate Earnest, Ebel, and Betten with full backpay. The Company argues that in view of the full remedy offered, the General Counsel had a duty to consider Respondent's offer on its merits rather than considering what effect this settlement would have on his entire case. As pointed out by the General Counsel, there is no rigid legal basis nor custom that directs or commands the General Counsel to settle part of a case where, as in this proceeding, a basic issue is Respondent's proclivity or propensity to violate the Act. In view of the serious and repeated contentions made by the Company that they were being denied pretrial and other aspects of due process, as duly reflected in the formal exhibits and then argued in the initial and later stages of this proceeding, the Company was given every opportunity under these particular circumstances to fully amplify and state on the record its positions in all such respects. However, in relation to the above, I have obviously given no considerations whatsoever to the Respondent's offers to settle or reinstate the above-named employees, and my findings herein are based solely on the merits of the testimony given before me. Earnest, Ebel, and Betten were named as alleged discriminatees in the complaint; in the final analysis they steadfastly remained in the complaint; and the Respondent had every opportunity and right to defend the same by either presenting testimony, or, as the Respondent did here, to refrain from introducing evidence in defense of these charges.

to know about his employees' union desires, yet claimed to know nothing about the union activities of the alleged discriminatees here in question. It is also argued that the Company seized upon the happenstance of the probationary period to rid itself of Bailey because of her attempts to influence other employees, that Liggens, Taylor, and Reid were discharged to make Bailey's termination appear lawful or to dispose of employees whom Bailey had influenced,[11] that at the time of the discharges Neuman had evaluation forms for only Taylor and Reid, that if the work by these four was so inferior Neuman would have discharged them immediately, and that Neuman's total testimony must be viewed warily in view of his false testimony regarding Liggens work ability.[12]

It appears clear to me that the four employees here in question were terminated because of the extremely poor quality in their work and, whereas, the nature of the Respondent's products necessarily requires of demands efficient and quality workmanship. There is more than ample evidence in this record to conclusively show that the wiring and soldering work they performed was generally faulty and as a result Neuman had a considerable number of rejects in his department. There is also evidence in this record that from time to time Neuman made efforts to help these four employees here in question to improve their work, but that such attempts or efforts were unsuccessful. The Respondent's quality control records are further indicative of their poor work, and upon their discharges on August 19, none of them refuted their foreman's reason

[11] Neuman admitted the closeness of these employees when he stated that Bailey, Taylor, and Reid "were like triplets, always together."

[12] Liggens' personnel card indicates she was hired on April 26, voluntarily quit on June 8 and was rehired on July 19. Neuman testified that Liggens worked for him prior to her quit and her work was then poor, but on her termination form which Neuman completed, Liggens was rated by Neuman as average and eligible for rehire.

and statement that they were being terminated due to poor workmanship.[13] I also agree that Neuman's own observation of their poor workmanship was supplemented by the complaints he received from repair workers, and that Neuman then found it necessary to use additional employees on repairs. These factors are all further substantiated by the uncontradicted evidence that the poor work performances of these four alleged discriminatees reached such serious conditions that Neuman was then required to have them place their initials and tags on each unit or piece they worked on. There is no contention or testimony that such a practice was in any way a common procedure at other times. Starting on August 8 inspection records were also kept, and I point out that all such procedures occurred prior to the time when Bailey overheard Jeano tell Neuman that she was the one who gave Roman a union card, as set forth previously herein. Neuman's testimony as to the poor work of these four employees in question was also corroborated by Penny Spokes. She stated, that Neuman had several conversations with her concerning the poor work performed by the four, and one occasion Neuman remarked that he was upset about several cartons of filter boxes that were rejected because of the poor workmanship of the four girls. On another occasion Neuman informed Spokes that he had to dismiss these four because of the poor work which they had done.

Foreman Neuman stated that the work of these four alleged discriminatees was of a poor quality from the very beginning of their employment. The General Counsel therefore argues that they should have been discharged immedi-

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[13] Plant inspection reports on filter boxes for August 8 show that there were 63 units worked on—35 were accepted and 28 rejected. On August 9 out of 21 filter boxes, 9 were accepted and 12 were rejected. On August 10 and 11, four were rejected. See Respondent's Exhibits 14-A through D. Respondent's Exhibits 15-A through J cover the period of October and November—*after* the discharges of the four here involved—and show that a significant change occurred in the number of filter box rejects.

ately. However, this record clearly reveals that these four employees in question were probationary employees for the first 60 days of their employment, and the purpose of conferring probationary status on a new employee is to afford him or her an opportunity to show that such an employee can properly perform the tasks assigned to him. As pointed out, if such employee is not performing to the satisfaction of management during this period, he or she can be discharged without resort to the detailed warning procedures afforded to nonprobationary employees. I agree that in accordance with the purposes of the above probationary system, Neuman gave these four ample opportunity to demonstrate that they could perform quality work, and were then discharged when it became obvious that they could not achieve the quality of workmanship required.

Turning to the General Counsel's argument and theory that the Company discharged the other three employees with Bailey either because Bailey could influence them to sign a union card and vote for the Union, or because discharging all of them wold hide Bailey's discharge.[14] Therefore, in the final analysis here, the General Counsel's case must ride on the Bailey theory as there is no reliable evidence whatsoever that the Company had any prior union knowledge as to Liggens, Reid, or Taylor. The final theory of the General Counsel is clearly stated, but in my opinion this record does not support it. The overwhelming evidence in this record shows that each one of the four alleged discriminatees involved in this phase of the case were discharged for cause because of their individual poor workmanship, and about the only inference remaining to the General Counsel is the testimony by Foreman Neuman that Bailey, Reid, and Taylor were a close threesome and always together. However, to deduce from this shred of testimony a conclusion or finding that the Company discharged all four here involved so that Bailey could not influence the

[14] The complaint alleges that the Respondent discharged these four employees because *each* of the employees engaged in union or concerted activities. [Emphasis supplied.]

other three, or hide Bailey's termination, is carrying unsupportable inferences from mere mutual associations to the ultimate extreme and beyond.

Respondent's Exhibit 16 and 17 are performance appraisals of Reid and Taylor. In August, Neuman discussed these appraisals with these two alleged discriminatees, and informed them as to the poor work they were doing. Neuman explained that he had not received the performance appraisals from the Industrial Relations Department for Bailey and Liggens because they had not been employees long enough and that it takes about 45 days and sometimes longer for such forms to reach him.

Although Neuman did not have the performance apprisal on Bailey at the time of her discharge—as argued by the General Counsel—it appears to me that Neuman gave credited and reasonable testimony in explaining the reason for its absence and, furthermore, this circumstance can in no way subtract from the facts that Neuman had constantly observed Bailey at her job, informed Bailey at numerous times of her bad work, and had also received complaints from his repair people.

The General Counsel also makes references in his arguments to the effect that these four alleged discriminatees were discharged at a time when Neuman admittedly stated that the Company had a serious labor shortage. Neuman testified that the day before their discharges he discussed the matter with his boss—Carl Claris. Neuman related that he told Claris that he was going "to let some girls go" because of their poor work and that he was getting a high rejection ratio. When asked why he discussed this matter with Claris—Neuman relied, "Well, I was afraid that—if I terminated the girls without telling him, I would be in trouble for letting four girls go, because at that time we had a terrible labor shortage over there, and we were trying to get any kind of labor in. Well, that was one of the bad parts. They would take anybody in the plant just to get bodies in the place." It is obvious from the above that the plant personnel office—in disagreement with Neuman—

was hiring inexperienced help and even placed newspaper advertisements for such employees, but this in no way casts any serious reflections upon the rights of the Company or their individual foremen to subsequently make full evaluations of such an employee's work performance, and especially so within the probationary period. Neuman also explained that the Company has a 1-week training program, and from then it is up to the individual. Neuman stated, "There is some employees you will have 6 months on the job and they will never be wirers and solderers." There is sufficient evidence here to show that Neuman gave serious consideration to the plant policy of hiring inexperienced help, and also recognized that there existed a general labor shortage, and hence, his discussion of the same with Claris. After so considering he concluded, however, that it was requiring too many of his people to repair the rejects he was receiving in filter boxes, that these four alleged discriminatees were not improving in their work, had no interest in their jobs, and that this department could not continue to function in this manner.

Neuman also testified as to the circumstances surrounding the personnel card of Liggens—another argument made by the General Counsel, as aforestated. When Liggens initially quit on June 8, Neuman placed the check on her card indicating she was eligible for rehiring and had average work ability (General Counsel's Exhibit 13). Neuman was then asked to explain her rehire on July 19, and he replied as follows: "Well, when she left I made out this here evaluation form, and I handed it in, but I never dreamed I would be getting her back again, because I wouldn't have her in my department. She even called me up and asked me if she could come back to the plant. I said, 'I don't do hiring. I guess so,' so the next thing I knew, she was back." As far as I can ascertain from this testimony and my observation of his demeanor while on the witness stand, Neuman is a very frank and outspoken person who is not in the habit, so to speak, of beating around the bush about anything. His explanation as to reasons on the above has a reasonable ring or basis, and the charitable manner in which Neuman

acted when Liggens quit cannot and should not be used here to discredit his subsequent valid reasons for her discharge on August 19. Neuman had nothing to do with her rehire, and never requested that Liggens be assigned to his department.

If I were to find for the General Counsel in this phase of the case, I would have to hold that an employee (Bailey) who passed out authorization cards, thereby gained immunity from discharge even though she and the three others here involved were constantly ignoring the high standards of work performance demanded by Foreman Neuman. Such is not the law. Under the Act employees can be discharged for any reason whatsoever so long as union considerations are not the moving cause. It has also long been recognized by the Board and the courts that under the Act it takes more than suspicion and inferences to prove a wrongful discharge. In the final analysis here the question for determination is whether Neuman was motivated by the alleged discriminatees' poor work habits, and I find that Neuman was so motivated.

In making my findings as to Bailey, Liggens, Reid, and Taylor I have specifically and carefully evaluated the Respondent's animus as demonstrated in the preceding sections of this Decision. I have further considered the fact that Bailey was known to Neuman as having circulated cards for the Union, and that Bailey and the other three here involved were frequently together. Nevertheless, on the basis of this record, the demeanor of the witnesses, and upon the reasons given above, I must conclude and have concluded that the General Counsel has failed to produce a preponderance of substantial evidence in proving that the four employees here in question were discriminatorily discharged. For these reasons it will be recommended that the allegations in respect to their discriminatory discharges be dismissed.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Since the Respondent has dominated and interfered with the formation and administration of The Committee and has contributed support thereto, I shall recommend that the Respondent cease and desist from such conduct and that it withdraw recognition from and completely disestablish The Committee as the representative of any of the Respondent's employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. I shall also recommend, in order to make effective the interdependent guarantees of Section 7 of the Act, that the Respondent cease and desist from in any manner infringing upon the rights guaranteed in said section. *N.L.R.B.* v. *Express Publishing Company*, 312 U.S. 426; *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4).

It will also be recommended that the Company offer Helen Earnest, Virginia Ebel, and Donald Betten immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to seniority and other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, by payment to them of a sum of money equal to that which they would have earned as

wages from the date of the discrimination against them to the date of offer of reinstatement less interim earnings, and in a manner consistent with Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289, to which shall be added interest at the rate of 6 percent per annum as prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union and The Committee are labor organizations within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Helen Earnest, Virginia Ebel, and Donald Betten, thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. By dominating and interfering with the formation and administration of The Committee, and contributing support thereto, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the conclusions of law, and upon the entire record in the case, it is recommended that Ampex Corporation, Elk Grove Village Division, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Dominating or interfering with the administration of The Committee or with the formation or administration of any other labor organization of its employees, and contributing support to The Committee or to any other labor organization of its employees.

(c) Recognizing or in any manner dealing with The Committee, or any reorganization or successor thereof, as a representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw all recognition from The Committee as a representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work, and completely disestablish The Committee as such representative.

(b) Offer to Helen Earnest, Virginia Ebel, and Donald Betten immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay suffered as a result of the discrimination against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(d) Notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

(e) Post at its Elk Grove Village, Illinois, plant copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's representative, shall be posted by Respondent and be maintained by it for 60 consecutive days, thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director for Region 13, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.[16]

(g) IT IS FURTHER RECOMMENDED that the complaint in respect to Evelyn Bailey, Mildred Liggens, Birdie Reid, and Alma Taylor be dismissed.

Dated at Washington, D.C.

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[15] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[16] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT dominate or interfere with the administration of the Committee, or with the formation or administration of any other labor organization of our employees, nor will we contribute support to The Committee or to any other labor organization of our employees.

WE WILL NOT recognize or in any manner deal with The Committee, or any reorganization or successor thereof, as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL withdraw all recognition from The Committee as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of work, and completely disestablish The Committee as such representative.

WE WILL offer Helen Earnest, Virginia Ebel, and Donald Betten immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority or other rights and privileges and make them whole for any loss of pay suffered as a regular of the discrimination against them.

WE WILL notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the union named herein or any other union.

AMPEX CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U.S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois, 60604, Telephone 828-7570.

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

AMPEX CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GERALD S. PATTERSON
HARRY SANGERMAN
Attorneys for Ampex Corporation

McDERMOTT, WILL & EMERY
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The Scheffer Press, Inc.—Andover 3-6850

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 2(5) 2, 5
Section 8(a)(2) 2, 5, 7, 8
Section 9(a) 2, 7, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No.

AMPEX CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ampex Corporation, by its attorneys, Gerald S. Patterson and Harry Sangerman, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on June 14, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*. pp. 1a) is reported at 442 F.2d 82 (CA7, 1971). The Board's decision and order are reported at 168 NLRB 742.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1971 (App., *infra*, p. 8a). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether groups of employees which meet with their employer to discuss items of mutual interest, including matters relating to employment, constitute a "labor organization" within the meaning of Section 2(5) of the National Labor Relations Act even though such employees do not represent fellow employees in the meetings.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*) are as follows:

> "Sec. 2(5). The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."
>
> "Sec. 8(a). It shall be an unfair practice for an employer—
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;"
>
> "Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collec-

tive bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

STATEMENT OF THE CASE

I. THE FACTS

In February, 1966, Petitioner (hereinafter referred to as "Ampex" or "the Company") initiated a Communications Committee (hereinafter referred to as the "Committee") for all personnel at its Arthur Avenue location in Elk Grove Village, Illinois. The Arthur Avenue facility is the only Ampex plant involved in this proceeding. The Committee was designed to provide a means whereby each individual employed at Arthur Avenue, including management personnel, could present and discuss his own personal views and make suggestions about efficiency and business matters in general. The Committee also was designed to be an employee safety committee as required by the Company's insurance carrier. Safety problems are discussed at the meetings, and the insurance carrier recognizes the Committee as a safety committee. The evidence established, and the Board so found, that no known union activity was occurring at Ampex at the time of the initiation of the Committee, and union considerations did not enter into the decision to go forward with it. The Board further found that Ampex did not recognize the Committee as the

bargaining representative of the employees nor did the Company ever engage in bargaining negotiations with the Committee.

The Committee exists without any formal operating structure. It has no officers, no bylaws, no financial resources of its own, no affiliation with any outside organization—union or otherwise—nor is it affiliated with any organization which bargains collectively for employees. Furthermore, there is no provision made for participants to represent other employees, and, in fact, all personnel attending do so as individuals. People from all segments or levels of the business participate in the meetings, and persons attending the meetings include office girls, secretaries, typists, technicians, engineers, accountants, supervisory senior engineers, production employees, production supervisors, operations manager, plant manager, and industrial relations personnel.

The Company attempts to provide each individual employed at Arthur Avenue with an opportunity to attend at least one meeting. This is accomplished by a method of random selection of personnel according to geographical area or level of business. Each geographical area has a roster of potential participants, each of whose name is given a certain number. The names are not in alphabetical order. Each month one employee who attended the previous meeting is asked only to choose a number with respect to each geographical area, and the number on the roster corresponding to the number chosen determines which person will attend from the particular area. Generally, until there is a full rotation of all personnel, no individual serves more than once since the idea is to get everybody to participate.

After participants are selected, notices of who is to attend the meeting are placed on the bulletin boards about two weeks prior to the meeting. Any person who refuses to attend is not required to do so.

The meetings generally last as long as discussion continues. Participants are free to discuss and make suggestions with respect to the Company's entire business operation, including matters relating generally to employment. However, participants are not free to attempt to resolve purely personal grievances since such matters are referred for resolution to the Company's grievance procedure. Minutes of the meetings are kept and placed on the bulletin board. Participants are not docked for time spent at the meetings.

There was no evidence that the Company's employees protested or were dissatisfied with the operation of the Committee. Nor was any evidence presented that the accomplishments of the Committee were in derogation of the rights of the Company employees or anything but beneficial to them.

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Committee is a labor organization within the meaning of Section 2(5) of the Act and that the Company violated Section 8(a)(2) of the Act by dominating and interfering with the administration of the Committee and by contributing support thereto. Based on these findings the Board ordered the Company to cease and desist from dominating, interfering with and supporting the Committee and to disestablish it.

III. THE DECISION OF THE COURT OF APPEALS

The court below granted enforcement of the Board's order with a slight modification not pertinent to this petition. The court held that the statutory definition of "labor organization" is broad and that while the Committee itself might not be a labor organization in the ordinary sense of the term, the statute reaches 'any . . . plan, in which employees participate and which exists for the purpose, . . . in part, of dealing with employers concerning grievances . . . wages, rates of pay, hours of employment, or conditions of work.' (App., *infra*, p. 2a)

REASONS FOR GRANTING THE WRIT

For all practical purposes, the holding of the Board and the court below eliminates face-to-face communication between non-union employers and their employees. While, in all due candor, the Seventh Circuit's opinion is a further extension of a long line of Board and appellate court cases striking down employee committees, the decision below represents an unwarranted and pernicious distortion of this Court's holding in *NLRB* v. *Cabot Carbon Co.*, 360 U.S. 203 (1959).

The decision below, when stripped of its legalisms and viewed in the practical world of labor relations, states essentially that unless a company is unionized the employer cannot meet with his employees to discuss matters relating to conditions of employment. Rather, the non-union employer must establish his personnel policies and correct the problems on the minds of his employees through uneducated guesswork at best and blind ignorance at worst. How incredible it is that a statute painstakingly designed to foster industrial accord could be interpreted to require a throwback to the old days when employer was master and employee was servant and never the twain did meet.

It will do your petitioner little good to cite cases in its behalf since virtually all of the precedent is on the other side. However, there is one distinguishing feature in this case which is worthy of this Court's attention and which gives this Court an opportunity to correct one of the most retrogressive conditions now imposed on employers and employees. This feature simply is the fact that the participants in the Committee's monthly meetings were selected at random each month so that all Ampex personnel ultimately would participate and that the participants were not given representative status but rather attended the meetings as individuals.[1]

The fact that Congress did not intend to eliminate all face-to-face communication between an employer and groups of employees is evident from the provisions of Sections 8(a)(2) and 9(a) of the Act. Thus, the proviso to Section 8(a)(2) states that subject to the Board's rule-making authority an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay. Yet notwithstanding the absence of any such published Board rules, the decision below prohibits Ampex from conferring with its employees during working hours. Furthermore, the proviso to Section 9(a) states that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of a bargaining representative.

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[1] c.f. *NLRB* v. *Cabot Carbon Co., supra.; NLRB* v. *Grand Foundries, Inc.* 362 F.2d 702 (CA8, 1966); *Powers Regulator Co.* v. *NLRB*, 355 F.2d 506 (CA7, 1966); *NLRB* v. *Western Reserve Telephone Co.*, 323 F.2d 564 (CA6, 1963); *NLRB* v. *Thompson Ramo Woolridge, Inc.*, 305 F.2d 807 (CA7, 1962).

The language in the Section 8(a)(2) and Section 9(a) provisos is readily reconcilable with the prohibition against an employer's domination and support of a labor organization by the simple deduction that not all groups of employees which meet with employer representatives are labor organizations. This is evident from the language of this Court in *NLRB* v. *Cabot Carbon Co., supra.*, a case which involved a highly formalized employee representation committee.

It is apparent from the *Cabot Carbon* decision that the vice in employer-dominated committees is not that the committees are comprised of employees, but rather that the employees on the committees purport to represent their fellow employees in the discussion of conditions of employment. Thus, in explaining the proviso to Section 9(a) the Court drew the distinction between employee groups which act as individuals and employee groups which act as representatives:

> "The amendment to §9(a) does not say that an employer may form or maintain an employee committee for the purpose of 'dealing with' the employer, *on behalf of employees,* concerning grievances. On the contrary the amendment to §9(a) simply provides, in substance, that any individual employee or group of employees shall have the right personally to present their own grievances to their employer, and to have such grievances adjusted, without the intervention of any bargaining representative, as long as the adjustment is not inconsistent with the terms of any collective bargaining contract then in effect, provided that the bargaining representative, if there is one, has been given an opportunity to be present. It is thus evident that there is nothing in the amendment of §9(a) that authorizes an employer to engage in 'dealing with' an employer-dominated 'labor organization' *as the representative of his employees* concerning their grievances." (360 U.S. 203, 217-218; Emphasis supplied)

The Committee does not represent employees at Ampex nor was it ever intended to act as an employee representative. Furthermore, the court below made no reference to employee representation on the part of the Committee but rather intimated that the "plan" itself, whether or not a representation plan, constitutes a labor organization.

Accordingly, the decision below, if upheld, eliminates any practical method by which the non-union employer can achieve meaningful communication with its employees. Obviously, where, as in the instant case, the employer desires to meet with all of his employees without creating an independent bargaining group, the employer must take the initiative in calling meetings, providing space, compensating employees and providing secretarial help. Consequently, if the assembly of employees itself is a "labor organization", there always will be an element of employer support.

Aside from eliminating generally any means of face-to-face communication between employer and employee in the non-union plant, the breadth of the decision below poses specific harmful effects on practices which have been accepted for many years as good labor relations. For example, it literally wipes out virtually every safety committee in non-union plants—a fact which will be extremely distressing to the framers of the new Occupational Safety and Health Act of 1970 (P.L. 91-596, 91st Cong., Dec. 29, 1970, eff. Apr. 28, 1971) which places great emphasis on the development between the employer and employee of safety programs in the plant.

This much-neglected area in the administration of the National Labor Relations Act needs review by this Court, and the Board and the courts below must be given guidance so as to bring them within the realm of present day sensibility.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD S. PATTERSON
HARRY SANGERMAN
Attorneys for Ampex Corporation

McDERMOTT, WILL & EMERY
111 W. Monroe Street
Chicago, Illinois 60603

August 1971.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 SEPTEMBER SESSION, 1970

No. 18181
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AMPEX CORPORATION,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board.

April 22, 1971

Before FAIRCHILD, CUMMINGS and PELL, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* The NLRB found that Ampex Corporation engaged in an 8(a)(2) unfair labor practice by dominating and interfering with the administration of a labor organization and contributing support to it, and 8(a)(3) and 8(a)(1) unfair labor practices by discharging Betten to discourage union membership and discharging Earnest and Ebel to discourage both union membership and other participation in concerted activities for mutual aid or protection.

The board adopted the trial examiner's decision and recommendations after making certain modifications and corrections.[1] Portions of the decision relate to charges which were dismissed and need not be reviewed. As to

[1] 168 N.L.R.B. No. 96.

the parts under review. Ampex challenges certain inferences and legal conclusions, but not the recitation of the basic facts. We deem it unnecessary to restate them here.

1. *Communications Committee as a labor organization dominated and supported by the employer.*

Ampex emphasizes the undisputed facts that the committee had no formal organization structure, that employees who were to attend a meeting were chosen at random from among groups of employees, that participation was rotated so that ordinarily no employee participated a second time until all others in his group had participated, that there was a separate grievance procedure in which the committee was not involved, and that the matters discussed at committee meetings ranged widely beyond the subjects concerning which employers and labor organizations ordinarily deal. Ampex likens the committee mechanism to a suggestion box, made less impersonal, and suggests that it was a channel of communication and a means of bringing "the monolithic corporation into relevant contact with its people."

We might well be persuaded that this particular mechanism was not a labor organization in the ordinary sense of the term. The statutory definition, however, is very broad. It reaches "any . . . plan, in which employees participate and which exists for the purpose, . . . in part, of dealing with employers concerning grievances, . . . wages, rates of pay, hours of employment, or conditions of work."[2]

---

[2] 29 U.S.C. §152(5). The entire definition reads: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The statute has been broadly construed, both with respect to absence of formal organization[3] and the type of interchange between the parties which may be deemed "dealing."[4]

There was ample evidence that the committee meetings often involved matters in some of the fields referred to in the statutory definition and resulted in action upon them by management. The inference, drawn by the examiner and the board, that this "dealing" was part of the purpose of the committee mechanism was reasonable.

Ampex next challenges the finding that it dominated, interfered with and contributed support to the committee.

It would be very difficult, however, to find that Ampex did not dominate and contribute support to the committee. Everything necessary for its functioning was done by management except for its attendance of employees selected for each meeting by the system devised by management. There is nothing in the record to suggest that the procedure would continue if it were left up to the employees.

Of course the committee mechanism was first set up more than six months before the charge was filed, so that the separate act of formation could no longer be proceeded against as an unfair labor practice. The fact that management wholly created it, however, may properly be considered to the extent that fact sheds light on whether it had any independence of management during the limitations period.[5] During the limitations period management decided when a meeting would be held. The committee had no function other than the meetings, there

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[3] *Pacemaker Corp.* v. *National Labor Relations Board* (7th Cir., 1958), 260 F2d 880, 883.

[4] *NLRB* v. *Cabot Carbon Co.* (1959), 360 U.S. 203, 213, 79 SCt. 1015 3 LEd2d 1175.

[5] *Local No. 1424, Internat. Machinists* v. *N.L.R.B.* (1960), 362 U.S. 411, 416, 80 SCt. 822, 4 LEd2d 832.

was no continuity in membership from meeting to meeting, and the employees who were to attend were selected by the procedure prescribed by management. Management presided and took notes for the minutes. There is no evidence of any employee initiative at work either in originally creating or in continuing the procedure.

Ampex relies on decisions holding that provision by the employer of various types of clerical assistance and other conveniences to particular labor organizations was mere cooperation which did not amount to domination or support. We have examined these cases and find that the organization involved in each had some reasonable claim to being an independent entity composed of employees and distinct from management. Not so here, and we deem the cases inapplicable.[6]

2. *Rejection of employer's offer of partial settlement.*

The complaint alleged that the discharges of Earnest, Ebel, and Betten in July and of four other employees August 19 were discriminatory and unfair labor practices. It also charged the 8(a)(2) unfair labor practice just discussed.

Ampex made a motion before the trial examiner that the Earnest, Ebel, and Betten charges be dismissed because Ampex had offered to settle those three and the General Counsel had rejected the offer. Such dismissal is said to be appropriate in order to implement a provision of the administrative procedure act requiring an

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[6] *Modern Plastics Corporation* v. *N.L.R.B.* (6th Cir., 1967), 379 F2d 201; *Federal-Mogul Corp., Coldwater Dist. Ctr. Div.* v. *NLRB* (6th Cir., 1968), 394 F2d 915; *Chicago Rawhide Mfg. Co.* v. *Natl. Labor Rel. Bd.* (7th Cir., 1955), 221 F2d 165; *Hotpoint Co.* v. *NLRB* (7th Cir., 1961), 289 F2d 683; *N.L.R.B.* v. *Newman-Green Inc.* (7th Cir., 1968), 401 F2d 1, 4; *Wayside Press* v. *National Labor Relations Board* (9th Cir., 1953), 266 F2d 862.

agency to give an opportunity for submission and consideration of offers of settlement.[7]

It appears that counsel for all parties had discussed settlement before the hearing. Ampex offered settlements with respect to the charges concerning Earnest, Ebel, and Betten, including reinstatement and full back pay, but, presumably, not including entry of a cease and desist order. General Counsel was willing to settle the entire case on the basis of offers of reinstatement and back pay for all seven, and withdrawal of the 8(a)(2) charge, as consented to by the charging party.

We do not think the administrative procedure act requires consideration by the examiner or the board of an offer of settlement in an unfair labor practice proceeding. 29 U.S.C. §153(d) gives the General Counsel final authority on behalf of the board in respect to the prosecution of complaints before the board. The independent authority thus given him is substantial.[8] On this record Ampex was given an opportunity for submission and consideration of its partial offer of settlement by trial counsel for the General Counsel, and in our opinion the requirement of the administrative procedure act relied on was fulfilled.

In the colloquy before the trial examiner, counsel for General Counsel gave as a reason for refusing to settle the three cases that he would then be unable to use evidence about those three discharges to help prove the discriminatory character of the other four. Although it may be true, as now argued by Ampex, that counsel was mistaken about the limitations he would be under, Ampex trial counsel did not at the time suggest willing-

[7] 5 U.S.C. §554(c).

[8] *International Union of Elec., Radio, etc.* v. *N.L.R.B.* (D.C. Cir., 1960), 289 F2d 757, 761; *Division 1267, Amal. Ass'n of Street, El. Ry., etc., Emp.* v. *Ordman* (D. S. Cir., 1963), 320 F2d 729; *Frito Company, Western Division* v. *N.L.R.B.* (9th Cir., 1964), 330 F2d 458, 464.

ness that the proof be so used, and we do not view the rejection of the offer as arbitrary, even if based on a mistaken view of the law.

Ampex relies on *Michigan Consolidated Gas Co.* v. *Federal Power Com'n* (D.C.Cir., 1960), 283 F2d 204. *Michigan Consolidated* involved an apparently complex question concerning fulfillment of requirements of natural gas service in the public interest. The commission had refused to consider a settlement proposal of considerable complexity which the court found promised to fulfill the commission's announced objective better than the course ordered by the commission. The court directed that on remand the proposal must be considered, but did not require that it be accepted. We do not consider *Michigan Consolidated* apposite here.

3. *Antiunion motivation for discharge.*

Because of the position of Ampex, discussed in part 2, above, Ampex offered no proof in answer to the claims concerning the Earnest, Ebel, and Betten discharges. Ampex argues here that there is no evidence that management had knowledge of the union activities of those employees and hence no evidence of an antiunion motivation for their discharges. There was some evidence that Betten had discussed union matters in proximity to a foreman who was watching him. Other direct evidence that interest in the union was made known to management was indeed slight. We conclude, however, that such knowledge could be properly inferred from all the circumstances, including timing, the irrational motivation to which the discharges must be attributed if the motivation was not antiunion, the references to the discharges as getting rid of the troublemakers, and the peculiarities of the procedures used, all as detailed in the trial examiner's decision. In Betten's case, moreover, a supervisor predicted Betten would be fired, set up a situation where Betten would be likely to give a colorable excuse, and followed through.

4. *Concerted activities of Earnest and Ebel.*

The board found that in discharging Earnest and Ebel, Ampex not only sought to discourage union membership, but also to discourage participation in concerted activities for mutual aid or protection. They acted together at the various stages of their quest for reclassification. Ampex would treat their activity as individual efforts, only fortuitously simultaneous. We think the board could properly find it joint and mutual.

5. *Overbreadth of order.*

The board's order, in subparagraphs 1, (a),(b), and (c) requires Ampex to cease and desist from practices corresponding to the unfair labor practices found. Ampex objects to the catchall subparagraph (1)(d) "In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act." The point is valid.[9]

The board's order will be modified by deleting subparagraph (1)(d) and as so modified will be enforced. The board is allowed its costs on appeal.

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[9] *National Labor Rel. Bd.* v. *Express Pub. Co.* (1941), 312 U.S. 426, 433; *N.L.R.B.* v. *Thompson Ramo Wooldridge, Inc.* (7th Cir., 1962), 305 F2d 807, 810.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
Monday, June 14, 1971

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge

National Labor Relations Board, Petitioner, vs. Ampex Corporation, Respondent.	Petition for Enforcement of an Order of the National Labor Relations Board.
No. 18181	

Upon the stipulation of counsel, filed June 7, 1971, the judgment heretofore entered on May 19, 1971 is vacated and the judgment attached to the stipulation is settled and entered this date as the judgment of this court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

National Labor Relations Board, Petitioner, v. Ampex Corporation, Respondent.	No. 18181

STIPULATION TO REOPEN AND
ENTER MODIFIED JUDGMENT
(Filed Jun 7 1971)

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

It is hereby stipulated and agreed that the Judgment entered in the above-captioned matter be reopened and

modified to conform to the order of the Court, dated April 22, 1971, and that a new Judgment be entered as set forth in the attachment hereto.

/s/ Harry Sangerman
Harry Sangerman, Attorney
for Ampex Corporation

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated: 6/3/71

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

National Labor Relations Board,
Petitioner,

v.

Ampex Corporation,
Respondent.

No. 18181

JUDGMENT

Before: Fairchild, Cummings and Pell, Circuit Judges

This Cause came on to be heard upon the application of the National Labor Relations Board to enforce its order dated December 7, 1967, directed against the above-named Respondent, its officers, agents, successors and assigns. The Court heard argument of respective counsel on November 4, 1970, and has considered the briefs and transcript of record filed in this cause. On April 22, 1971, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's said order as modified. In conformity therewith, it is hereby

Ordered And Adjudged by the Court that Ampex Corporation, Elk Grove Village, Illinois division, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in District No. 8, International Association of Machinists and Aerospace Workers, AFL-CIO, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Dominating or interfering with the administration of The Communications Committee or with the administration of any other labor organization of its employees, and contributing support to The Committee or to any other labor organization of its employees.

(c) Recognizing or in any manner dealing with The Committee, or any reorganization or successor thereof, as a representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Withdraw all recognition from the Commission as a representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work, and completely disestablish The Committee as such representative.

(b) Offer to Helen Earnest, Virginia Ebel, and Donald Betten immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay suffered as a result of the discrimination against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all pay-

roll records, social security payment records, timecards, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(d) Notify any of the above-named employees if presently serving in the Armed Forces of the United States of their rights to full reinstatement upon application in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

(e) Post at its Elk Grove Village, Illinois, plant copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 13, (Chicago, Illinois) after being signed by Respondent's representative, shall be posted by Respondent and be maintained by it for 60 consecutive days thereafter; in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material.

(f) Notify the said Regional Director, in writing, within 10 days from the date of this Judgment, what steps Respondent has taken to comply herewith.

It Is Further Ordered that costs shall be taxed against the Respondent.

Dated:

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Judgment of the United States Court of Appeals enforcing as modified an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in District 8, International Association of Machinists and Aerospace Workers, AFL-CIO, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees because of their concerted or union activities, or any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT dominate or interfere with the administration of the Committee, or with the administration of any other labor organization of our employees, nor will we contribute support to The Committee or to any other labor organization of our employees.

WE WILL NOT recognize or in any manner deal with The Committee, or any reorganization or successor thereof, as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of work.

WE WILL withdraw all recognition from The Committee as a representative of any of our employees for the purpose of dealing with us concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of work, and completely disestablish The Committee as such representative.

WE WILL offer Helen Earnest, Virginia Ebel, and Donald Betten immediate and full reinstatement to

their former or substantially equivalent positions without prejudice to seniority or other rights and privileges and make them whole for any loss of pay suffered as a result of the discrimination against them.

WE WILL notify any of the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the union named herein or any other union.

AMPEX CORPORATION

(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U.S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois, 60604, Telephone 828-7570.

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SUPREME COURT, U. S.

No. 71-320

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In the Supreme Court of the United States

OCTOBER TERM, 1971

AMPEX CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. On April 22, 1971, the court of appeals issued its opinion holding that the Board's order against petitioner should be enforced, except in one respect not material here (Pet. App. 1a-7a). The Board's order ran against "Ampex Corporation, Elk Grove Village, Illinois division, its officers, agents, successors, and assigns" (R. 197).[1] On May 19, 1971, the

[1] "R." refers to the Appendix to the briefs in the court of appeals.

court entered a judgment which inadvertently omitted the qualifying phrase "Elk Grove Village, Illinois division." On June 14, 1971, upon stipulation of the parties, the judgment was amended solely for the purpose of adding that qualifying phrase and thereby conforming the judgment to the court's April 22 decision. (Pet. App. 8a-9a.)

Since the amendment to the judgment had no bearing on the issue on which certiorari is sought and was merely a technical correction, the 90-day period for filing a petition for a writ of certiorari, prescribed by 28 U.S.C. 2101(c), began to run on May 19, 1971, when the judgment was first entered, rather than on June 14, 1971, when it was amended. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211, 213. Counting from May 19, 1971, the 90-day period expired on August 17, 1971. The petition was not filed until September 1, 1971, and no extension of time was obtained. The petition is thus untimely and should be denied.

2. In any event, the question on which certiorari is sought—whether the employee organization (the Committee) which petitioner was found to have unlawfully dominated and assisted constitutes a labor organization[2]—raises no issue warranting further

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[2] Section 8(a)(2) of the National Labor Relations Act (Pet. 2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *." Section 2(5) defines "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole

review. The Board found that the Committee regularly raised and discussed "grievances" as well as questions and suggestions about "wages," "hours of employment," and "conditions of work" (R. 168-171). Committee proposals were often approved at employee meetings or thereafter, and, as a result of employee complaints, changes were made therein (R. 48). Minutes of Committee proceedings were kept; and, after they were typed, copies were distributed to the employees and posted on the plant bulletin boards (R. 48, 49). These facts amply support the conclusion that the Committee was a labor organization within the meaning of the Act, despite the absence of a formal structure or elected representatives. *National Labor Relations Board* v. *Cabot Carbon Company*, 360 U.S. 203, 210-212; *Pacemaker Corp.* v. *National Labor Relations Board*, 260 F. 2d 880, 883 (C.A. 7).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

OCTOBER 1971.

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or in part, of dealing with employers concerning grievances, * * * wages, rates of pay, hours of employment, or conditions of work" (Pet. 2).

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